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In the

Supreme Court of the United States

OCTOBER TERM, 1966

GEORGE N. CHRISTOFALOS,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, George N. Christofalos, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, denying Petitioner's motion to file an amended petition for review, and dismissing the petition for review of orders entered by the Immigration and Naturalization Service, Respondent.

JUDGMENT AND OPINION OF THE COURT BELOW

The denial by the District Director of the request for additional time for the petitioner to depart from the United States is printed in the Appendix "A".

The denial of the application for permission to reapply for admission into the United States after deportation is printed in the Appendix "B".

The order of the Court of Appeals denying leave to file an amended petition for review and dismissing the original petition for review will be found in Appendix "C". The order of said court referred to in Appendix "C" will be found in Appendix "D".

JURISDICTION

The order of the Court of Appeals sought to be reviewed was dated and entered November 15, 1966. The mandate of the Court of Appeals was stayed for ninety (90) days from the date of the entry of said order, pending the filing of the petition in this court for a Writ of Certiorari. Jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was the denial of the request for additional time to leave the United States an abuse of discretion?

2. Was the denial of the application for permission to reapply for admission into the United States after deportation an abuse of discretion?

3. Was the order of the court below dismissing the petition for review, on the grounds that it involved a decision within the discretion of the administrative officer, an error on the part of the court below?

4. Was the dismissal of the petition for review by the court below, on its own motion, before oral argument, and even before the time for filing the reply brief by the petitioner had expired, an error on the part of the court below?

STATUTES INVOLVED

Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. 1254(e) which provides:

> "(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."

Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f), which provides:

> "(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

8 Code of Federal Regulations 244.2, which provides:

> "A request by an alien for an extension of time within which to depart voluntarily shall be filed with the district director having jurisdiction over the alien's place of residence. Written notice of the district director's decision shall be served upon the alien, and no appeal may be taken therefrom."

Also in *8 C.F.R. 103.3,* it is provided that whenever a formal application or petition is denied, the applicant should be given written notice setting forth the specific reasons for such denial. It appears that this regulation was ignored by the respondent, since no written reasons or oral reasons for the denial were given to the petitioner by the respondent. Therefore, if for no other reason, the matters should be remanded to the respondent, with directions to give written reasons for the denial to the petitioner.

Section 212 (a)(17) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(17), which provides:

> "Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> • • •
>
> (17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 242(b), unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission;"

STATEMENT OF THE CASE

Petitioner is a native of Greece, presently a citizen of Canada, who last entered the United States at the port of Detroit, Michigan as a visitor on or about September 10, 1965 and who has remained in the United States ever since that time.

He is married to a native born citizen of the United States and has a United States citizen child, born September 23, 1962. He also has a United States citizen stepchild, a product of his wife's first marriage, who is also of tender years. He is living with and supporting all of these three United States citizens (Record—page 65).

On February 24, 1966, after a hearing before the Special Inquiry Officer of the Respondent, petitioner was granted voluntary departure at his own expense, and thereafter was given until March 11, 1966 to depart from the United States.

Since petitioner is married to a United States citizen, he is eligible to file an application for a visa with the American Consulate in Toronto, Ontario, Canada, in which city he formerly lived. An immigrant visa is available to him as the husband of an American citizen. Such application was being processed at the Toronto Consulate, but the processing was halted while the application for permission to reapply for admission was being processed by the Respondent. If and when the processing had been completed, if the petitioner was found eligible for the issuance of a visa, he would be notified to appear for the issuance of a visa, which ordinarily takes only part of a day. He would, therefore, be separated from his spouse and from his means of support for only one day.

However, the processing of the application ordinarily takes several months and the petitioner had been granted only about two weeks from the date of his hearing, within which to leave. Thereafter he made a written request for an extension of this time for voluntary departure on March 10, 1966, but the request was denied (Record—pages 1 and 2).

The processing of the visa application in the American Consulate in Toronto, Ontario, Canada, was terminated when the Respondent denied the application of the Petitioner for permission to reapply for admission to the United States after deportation, which is required under the law.

After the application for permission to reapply was denied by the Respondent, the Petitioner sought to amend his original petition for review, to include a review of such denial in the pending proceedings before the Court of Appeals below. However, that court not only denied the motion to permit the review of that denial to be added to the proceedings, but also dismissed the original petition for review, although no motion to dismiss had been made by the Respondent and although the time for the Petitioner to file a reply brief had not yet expired, and no oral argument was ever had on any part of the petition for review.

REASONS FOR GRANTING A WRIT OF CERTIORARI

In two cases involving the Immigration and Naturalization Service, entitled *Immigration and Naturalization Service, petitioner,* v. *Giuseppi Errico;* and *Muriel May Scott, nee Plummer, petitioner,* v. *Immigration and Naturalization Service,* which decisions were rendered on December 12, 1966, and are reported in 35 U.S. Law Week 4092, the Supreme Court held, among other things, that "The intent of the Act is plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive

sections that are designed to keep *undesirable or harmful aliens* out of the country."

The decision further cited *H.R. Rep. #1199, 85th Congress, First Session, page 7 (1957)*. See also *S. Rep. No. 1057, 85th Congress, First Session (1957)*, which states:

> "The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problems of keeping families of United States citizens and immigrants united."

The court further stated, at page 4095:

> "Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed:
>
> > 'We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. *Delgadillo* v. *Carmichael*, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.' *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10. See also *Barber* v. *Gonzales*, 347 U.S. 637, 642-643.
>
> "We conclude that to give meaning to the statute in the light of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens, the conflict between the

> circuits must be resolved in favor of the aliens, and that the *Errico* decision must be affirmed and the *Scott* decision reversed."

The Record shows that the alien is married to a native born citizen of the United States, that he is the father of a United States citizen child and that he is the stepfather of another United States child, his wife's daughter by her former marriage. He is residing with, and supporting, all of these three United States citizen relatives.

Consideration should be given to these factors and the attention of the Court is called to the decision in the *Matter of H-R—*, 5 I & N Dec. 769. This decision gave the various requirements, any one of which would be sufficient to qualify an alien for the granting of permission to re-apply for admission after arrest and deportation. One of the factors which would qualify such alien was:

> "unusual hardship would result to persons lawfully in the United States if the application should be denied".

Certainly these United States citizen relatives of the alien are lawfully in the United States, and certainly unusual hardship would result to them if this application for permission to reapply is denied.

A more recent case which follows this reasoning was the *Matter of S-N—*, 6 I & N Dec. 73. This was an exclusion proceeding in which one of the grounds for exclusion was the fact that the alien had been previously arrested and deported and was, therefore, excludable. However, the Board of Immigration Appeals granted the alien the right to enter the United States and said in its decision:

> "Upon full consideration of all the circumstances in the case, in order to enable applicant to rejoin his

> wife and child, we will direct the nunc pro tunc grant of permission to re-apply for admission after arrest and deportation, and thus remove the ground of inadmissibility."

The present alien comes squarely within the criteria set forth in these two cases. The denial of the application for permission to reapply for admission into the United States should be reversed and the application should be granted.

In a recent case before the Regional Commissioner of the Respondent, in St. Paul, Minnesota, where the Chicago office of the Respondent had denied the application for permission to reapply for admission into the United States after deportation, the Regional Commissioner reversed and granted the application. This was the case of *Paraskevas Cotsovos, I & N Service, File #A11 912 239, September 1 1966.* He had only a U.S. citizen wife, but no children.

The reasons given by the Chicago office of the Respondent were:

> "Your application does not merit the favorable exercise of the Attorney General's discretion because you were previously deported and then reentered the United States without prior approval of the Attorney General. You represented yourself as a permanent resident alien to an officer of this Service, when, in fact, you were not. You assisted another alien, illegally in the United States, to evade Immigration officers. You have repeatedly violated the Immigration laws of the United States."

The Regional Commissioner reversed the Chicago office and stated:

"After careful consideration of the entire record of this case, we have concluded that the compassionate aspects far out-weigh the adverse factors."

It might be well also to note that the application for permission to reapply was filed with the Respondent on November 12, 1965 and according to the Second Supplemental Record, page 5, notice of the decision of the Respondent denying such application was not sent until June 2, 1966. The Respondent contends that giving the applicant fifteen (15) days after his hearing, at which he was granted voluntary departure, was sufficient time to process his visa application at the American Consulate in Toronto. The American Consul could not even process the matter until the permission to reapply had been ruled upon by the Respondent, so that Respondent's delay, as well as Respondent's denial of the application, made it impossible for the Petitioner to complete his processing for a visa.

Counsel for the petitioner is aware of the many decisions holding that as a general rule the courts should not substitute their discretion for the discretion of the Attorney General.

However, the discretion of the Attorney General is not absolute or dictatorial but can be and has been overruled in cases relating to other sections of the Immigration and Nationality Act which rest upon the discretionary action of the Attorney General.

The petitioner is entitled to have the discretionary action of the Attorney General reviewed to determine if procedural due process has been granted to the alien and if the Attorney General has abused his discretion. See *Cakmar* v. *Hoy,* 265 F. 2nd 59.

In the case of *Acosta* v. *Landon*, 125 F. Supp. 434, it was held that where the alien applied for suspension of deportation under Section 244(a) of the Immigration and Nationality Act, and showed that he had lived in the United States for forty (40) years, and other facts in support of his application, and the Special Inquiry Officer found that his deportation would not result in "exceptional and extremely unusual hardship", there had been an abuse of discretion, and that such discretion was judicially reviewable.

One of the requirements for voluntary departure under the law is good moral character. This factor was conceded by the Respondent, or Respondent would not have granted voluntary departure to the petitioner.

The fact that he is in the United States in violation of the laws relating to immigration is conceded. However, there is no great harm to the United States by permitting him to stay until his visa application is processed in Canada. As a matter of fact his continued stay will insure his continued employment here and his continued ability to support his United States citizen wife; child and step-child. The petitioner's remaining in Canada for the several months required for the processing of his visa application would be expensive, apart from the loss of his income here in the United States.

Attention of the court is directed to the case of *Matter of F - - -*, 9 Int. Dec. 333. This was a decision of the Board of Immigration Appeals construing 8 C.F.R. 244.1. This is a section of the Code of Federal Regulations which authorized voluntary departure in lieu of deportation if the alien establishes that he is willing and has "the immediate means with which to depart promptly from the United States".

This decision of the Board of Immigration Appeals, which is a precedent decision, was entered in a case where a crewman who had stayed in the United States more than the period of his "shore leave", was therefore deportable.

He asked for voluntary departure and was denied by the Special Inquiry Officer because it was held that he did not have the *present* ability to enter some other country.

It was shown that he had an offer of employment from a shipping line sailing out of Trinidad, if he could get to that country. The Record showed that it took several months to obtain a visa for such a crewman to enter Trinidad. The Board reversed the Special Inquiry Officer and stated:

> "It is our conclusion that the regulations regarding voluntary departure must be applied in the light of the facts of each individual case. We find that the facts here indicate distinct probability that the respondent will be able to effectuate voluntary departure within a reasonable period of time. Here we consider as important the fact that respondent and his counsel are making substantial efforts to depart to some country other than Yugoslavia. *We deem it only proper that a sufficient and reasonable time be allotted respondent to conclude his arrangements.*"

The Respondent not only failed to accord "a sufficient and reasonable time" to the Petitioner to conclude his arrangements, but also made it impossible for him to do so by denying the application for leave to reapply for admission after deportation.

The decision of the Court of Appeals below of November 15, 1966 is clearly erroneous because it bases its denials of the relief sought for as follows:

> "The circumstances disclose that the decisions involved are within the discretion of the administrative officers. For the above reason, and for the reasons stated in the order of October 14, 1966, that order is hereby affirmed."

In the order of October 14, 1966, which denied the motion to amend the petition for review, so that it should include an appeal from the denial of the permission to reapply, the court cited the decision of the Respondent denying such application as follows:

> "It is a matter of the Attorney General's discretion because you repeatedly and knowingly entered the United States after having been deported from the United States without obtaining the Attorney General's permission to reapply for admission."

It is obvious, therefore, that the court did not look into the question of whether discretion had been abused but merely indicated that since it was a matter of the discretion of the administrative officers, that it would not review the order. As stated in the decision cited previously in the present petition for Writ of Certiorari, the case of *Paraskevas Cotsovos, I & N Service, File #A11 912 239, September 1, 1966,* involved an alien in much the same circumstances as the present Petitioner, except that *Cotsovos* only had a United States citizen wife and the present alien has a United States citizen wife, child and step-child.

Another decision of the Respondent which was previously cited was *Matter of H-R—*, 5 I & N Dec. 769, in which it was held that permission to reapply should be granted because "unusual hardship would result to persons lawfully in the United States if the application should be denied".'

The only part of the Record on which the court below might have based its perfunctory dismissal of the petition for review would be found in paragraph 11 of the Government's answer to the motion for leave to file the amended petition for review, in which the Government suggested that "The petition and the amendments are patently frivolous on their face."

The case cited in support of this by the Government was *Johnson* v. *United States,* 327 U.S. 106. However, in that case a motion for a new trial had been denied because it was based on conflicting new evidence which the court felt it could not consider, and the case is certainly not in point in the present situation.

Let us consider whether the Respondent's suggestion that the court dismiss this appeal as being "patently frivolous" should be allowed. Webster's 7th New Collegiate Dictionary defines "frivolous" as follows:

(1) Of little weight or importance, slight;

(2) Marked by trifling or unbecoming levity; Playful.

Which of these two definitions does the Respondent contend applies to the present petition? Would the Respondent say that this case is "of little weight or importance, or slight"? Does the Respondent seriously claim that this appeal is "Marked by trifling or unbecoming levity" or "playful"?

It is absolutely disgraceful for the Respondent to so characterize the petition for review which seeks only to review the flagrant abuse of discretion by the Respondent in denying the Petitioner sufficient time to leave the United States, so that he should have all arrangements made to pick up a visa in Canada, being gone from his

employment and from his United States citizen family for a minimum of time, and to review the decision denying him leave to apply for readmission.

The denial of the application for permission to reapply amounts to a banishment of the Petitioner from the United States. It follows that his United States citizen wife, his United States citizen child and his United States citizen step-child, all of whom he is supporting, will necessarily all be banished from their native land because they must follow their husband and father for the sustenance and companionship which he alone can afford to them.

That the Petitioner is a person of good moral character has been conceded by the Respondent, since the Statute which authorizes the Attorney General to grant voluntary departure requires a finding that he has been a person of good moral character for the five (5) years immediately preceding the granting of voluntary departure, and such voluntary departure was granted. 8 U.S.C. 1254(e).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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